

1  
2  
3  
4  
5  
6  
7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF OREGON  
10 PORTLAND DIVISION  
11

12 ARCH CHEMICALS, INC.,  
13 a Virginia corporation, and  
LEXINGTON INSURANCE COMPANY,  
a Massachusetts corporation,

14 Plaintiffs,

Civil No. 07-1339-HU

Order on Plaintiffs' Oral  
Motion in Limine to Exclude  
Evidence of Willful and Wanton  
Misconduct

15  
16  
17 v.

18 RADIATOR SPECIALTY COMPANY,  
19 a North Carolina corporation,

20 Defendant.  
21

22 HUBEL, Magistrate Judge.

23 During the pretrial conference while discussing the  
24 plaintiffs' motions in limine and the evidence defendant had  
25 indicated it would be offering at trial, the court noted the  
26 similarity between the proffered evidence and the issue addressed  
27 by Plaintiffs' motion for partial summary judgment to eliminate the  
28 affirmative defense alleging there is no right to contribution for  
punitive damage liability [dkt #314]. In that motion plaintiffs

1 had sought an order that there being no material issue of fact  
2 that the settlement with the Davidson family did not include any  
3 payment for punitive damages. That motion for partial summary  
4 judgment was granted for the reasons stated in the opinion and  
5 order filed on December 13, 2010, pages 10 to 14. [dkt#387]

6 At the time this motion [dkt# 314] was filed by the  
7 plaintiffs, the amended answer the defendant had sought and been  
8 granted leave to file in an order dated June 30, 2009, had not been  
9 filed by the defendant despite the approaching trial. The form of  
10 answer defendant had sought leave to file had a Fifth Affirmative  
11 Defense (Failure to Apportion Punitive and Compensatory damages)  
12 and a Sixth Affirmative Defense (Willful and Wanton Misconduct).  
13 The Fifth Defense was based on the failure to apportion punitive  
14 and compensatory damages in the Settlement Agreement resolving the  
15 Davidsons' claims. It was argued that this failure caused the  
16 entire contribution action to fail since contribution is not  
17 available for punitive damages and with the amount of punitive  
18 damages paid for the release being unknown, no contribution could  
19 be obtained by plaintiffs. The Sixth Defense alleged that Arch  
20 Chemicals conduct creating liability to the Davidsons was willful  
21 and wanton and as a result contribution was barred by O.R.S.  
22 31.600. Both defenses rely on the premise that punitive damages or  
23 damages flowing from willful and wanton conduct are personal to the  
24 actor and under Oregon law cannot be subject to joint liability  
25 which is necessary to support a contribution claim.

26 Seventeen days after the opinion and order granting the  
27 plaintiffs summary judgment against the fifth affirmative defense,  
28 the defendant for the first time since being granted leave on June

1 30, 2009, filed its revised amended answer on December 30, 2010.  
2 It raised the same two defenses despite the December 13, 2010  
3 opinion and order. As a result plaintiff filed motions in limine  
4 to exclude the evidence defendant planned to offer on the punitive  
5 damages fifth affirmative defense and it encompassed the evidence  
6 that was offered on the willful and wanton defense. See document  
7 # 441.

8 When I granted the motion in limine, defense counsel asked if  
9 the court was striking the willful and wanton misconduct defense.  
10 The effect of my order does strike the defense and upon further  
11 reflection and review of defendant's authorities and arguments I  
12 reaffirm that ruling.

13 As the Fifth Affirmative Defense description chosen by the  
14 defendant notes, it is a defense based on the failure to apportion  
15 punitive and compensatory damages in the settlement agreement with  
16 the Davidsons. It has never been the defendant's position that  
17 compensatory damages were not subject to an action for  
18 contribution. It is unclear if the Sixth Affirmative defense tries  
19 to approach the issue from perhaps a different angle, claiming that  
20 all the liability of Arch for compensatory and punitive damages is  
21 based on Arch's alleged willful and wanton misconduct and thus not  
22 able to support a contribution claim. The damages award for  
23 compensatory damages are intended to make the plaintiff who was  
24 injured whole as best a money award can accomplish that. Punitive  
25 damages on the other hand are intended to punish the defendant  
26 whose conduct is sufficiently culpable and deter others from acting  
27 in a similar manner. Because punitive damages are measured by the  
28 particulars of each defendant's conduct, the defendant argues that

1 joint liability, necessary to support a contribution action, cannot  
2 be established for these exemplary damages under Oregon law,  
3 relying on Shin v. Sunriver Preparatory School Inc., 199 Or. App.  
4 352, 111 P.3d 762 (2005) and Andino v. Tamarack Steakhouse and  
5 Saloon, LLC, 2005 WL 1182362 (9<sup>th</sup> Cir. 2005).

6       These cases do not address the situation before this court.  
7 Shin was a case where a former international student sued a private  
8 boarding school for negligently failing to supervise the student  
9 while her father visited resulting in the father raping and  
10 sexually abusing the student. At trial before a jury, the school  
11 sought to have the jury apportion fault for the injuries sustained  
12 by the plaintiff between it (based on claims of negligence) and the  
13 father (based on alleged intentional torts in the third party  
14 complaint). The trial court found that the comparative fault  
15 statute did not allow such a comparison of intentional fault with  
16 negligent fault. On appeal, the Court of Appeals affirmed noting  
17 that:

18       "\*\*\*From what we glean that 'fault' as used in the 1975  
19 amendments-now codified at ORS 30.600 and ORS 30.605-  
20 includes 'tortious conduct, however described, in which  
21 contributory negligence is an appropriate defense.'  
22 [citation omitted] Before the adoption of comparative  
23 fault, contributory negligence was not a defense to  
24 willful or intentional misconduct. [citations omitted]  
25 Accordingly, intentional misconduct is not 'fault'  
26 subject to apportionment within the meaning of ORS 30.600  
27 and 30.605."

28 Shin, 199 Or. App. at 376.

      The Shin case involved the intentional torts of the father.  
The father had been joined by Sunriver Prep as a third party  
defendant. The reported opinion never mentions what tort theory  
was alleged to create the father's liability, but it is clear the

1 court of appeals treated it as an intentional tort. Indeed, when  
2 the court summarized its holding it abandoned the needlessly broad  
3 language about willful conduct cited above and said "\*\*\*ORS 31.600  
4 [sic, presumably the court meant ORS 30.600 as it cited to earlier]  
5 and related statutes do not encompass intentional conduct to which  
6 contributory negligence was not a defense." Shin, 199 Or. App. at  
7 379.

8 Oregon case law has an interesting wrinkle with respect to  
9 intentional torts. It takes the position that some intentional  
10 torts include an element of subjective intent to harm the victim,  
11 while other intentional torts, such as battery, do not. Indeed,  
12 one case noted that battery, while an intentional tort, has a  
13 lesser included tort of negligently inflicted injury. See, Ledford  
14 v. Gutoski, 319 Or. 397, 405, 877 P.2d 80 (1994):

15 "The subjective intent of the defendant is an  
16 element of malicious prosecution. That is not the  
17 case with respect to some other intentional torts,  
18 such as battery, as to which this court has  
19 concluded that the inference of an intent to cause  
20 harm does not apply. Those other intentional torts  
21 have 'lesser included torts,' such as negligence,  
22 under which liability may be imposed for similar  
23 conduct without any subjective intent to cause  
24 harm."

25 While Shin does not identify the tort alleged against the  
26 father, the court of appeals presumably found it embodied a  
27 subjective intent to harm such that a lesser included tort such as  
28 negligence would not support liability that could be apportioned.  
Absent from the Shin case is any discussion of apportioning  
damages. It is a case that addresses apportioning fault. The  
subject of punitive damages is not present in Shin's discussion of  
apportioning fault.

1 That being said, taking Shin literally for the moment, the  
2 question is whether willful and wanton misconduct or any conduct  
3 leading to liability for punitive damages was subject to a defense  
4 of contributory negligence before the adoption of comparative  
5 fault. In Blunt v Bocci et al, 74 Or. App. 697 , 704 P.2d 534  
6 (1985), a motorist injured in an auto accident sued the estate of  
7 the deceased driver of the other car and the club that allegedly  
8 served him alcohol when he was visibly intoxicated. The successful  
9 plaintiff recovered punitive damages against the club.

10 In Grady v. Cedar Side Inn, Inc, 330 Or. 42, 997 P.2d 197  
11 (2000), a passenger injured in an auto accident sued his own driver  
12 and the convenience store that had sold both the plaintiff and his  
13 driver alcohol when the driver was visibly intoxicated. The store  
14 argued on appeal that plaintiff, being complicit in the drinking,  
15 was barred from having any claim for his injuries. The Supreme  
16 Court noted this was a case of first impression in Oregon. It  
17 found that to bar the claim outright as suggested by the defendant  
18 would reestablish contributory negligence as a defense which the  
19 legislature had abolished. The court went on to say that the  
20 complicity of the plaintiff was properly treated under Oregon's  
21 comparative fault scheme as fault for the jury to apportion between  
22 the plaintiff and the defendant. Grady, 330 Or. at 46-7.

23 Assuming without deciding that the Oregon Supreme Court would  
24 follow the Court of Appeals decision in Shin, and reading Grady and  
25 Blunt together, it appears the Supreme Court would not extend the  
26 holding that fault cannot be apportioned between intentional torts  
27 and negligence to all situations involving liability for punitive  
28 damages. Since the Supreme Court is aware that punitive damages

1 are recoverable in cases like Blunt where an establishment serves  
2 a visibly intoxicated person who later injures a third party, and  
3 yet any fault of the injured plaintiff can be compared to the fault  
4 of the establishment under Grady , the implication seems clear that  
5 some damages can be apportioned according to fault between the  
6 defendant who may be liable for punitive damages and the plaintiff  
7 who is guilty of only simple negligence. While I acknowledge the  
8 Grady and Blunt decisions do not address directly the apportionment  
9 of punitive damages, neither did Shin. So the question of an  
10 apportionment for fault leading to liability for punitive damages  
11 remains after these cases.

12 I note also the opinion in Sandford v. Chevrolet Division of  
13 General Motors, 292 Or. 590, 642 P.2d 624 (1982). While it is an  
14 opinion many might rather forget, it does decide an issue of some  
15 significance here. It did hold that in a products liability claim  
16 against a manufacturer of an allegedly defective product, the  
17 injured plaintiff is subject to a defense of comparative fault.  
18 The number of cases where a strict product liability plaintiff  
19 received an award of punitive damages against a manufacturer are  
20 too numerous to cite.

21 The court has found a case that does address the question of  
22 comparing fault of an injured plaintiff with that of a defendant  
23 and differentiates between compensatory damages and punitive  
24 damages. Waddill v. Anchor Hocking, Inc., 175 Or. App. 294 (2001),  
25 involved a plaintiff who received a verdict assigning 25% fault to  
26 plaintiff and 75% fault to defendant. Compensatory damages were  
27 found to be \$134,472 and punitive damages were set at \$1,000,000.  
28 Judgment was entered after reducing the compensatory damages by 25%

1 with no reduction in the punitive damages in the sum of \$1,100,854.  
2 On appeal the defendant argued the punitive damages should have  
3 been reduced by 25% as well.

4 In rejecting defendant's argument, the court of appeals noted  
5 that there is a different purpose for compensatory damages and  
6 punitive damages, as well as a different basis of liability for  
7 them. Compensatory damages are intended to compensate the  
8 plaintiff for that portion of his or her damages caused by  
9 defendant's conduct in order to make the plaintiff whole. Punitive  
10 damages on the other hand are not intended to compensate the  
11 plaintiff, but rather to punish the defendant for particularly  
12 egregious conduct and to deter others from engaging in that  
13 conduct. The court found no basis for reducing the punitive  
14 damages by the percentage of plaintiff's fault because plaintiff's  
15 fault did not cause the defendant's conduct to which the punitive  
16 damages are intended to respond.

17 Turning back to the opinion and order granting the summary  
18 judgment to plaintiffs on the fifth affirmative defense related to  
19 a failure to apportion the punitive damages from the compensatory  
20 damages in the Davidson settlement, all the evidence supported but  
21 one conclusion. There were no punitive damages paid to obtain that  
22 release. Indeed, looking at the record of this case one finds the  
23 declaration of J. Michael Alexander, one of the attorney's  
24 representing the Davidsons. [dkt#135. filed April 3, 2009]. There  
25 he explains why the settlement never contemplated any amount for  
26 punitive damages, but only included compensatory damages.

27 "5. The claim for compensatory damages in this case  
28 was fully supported by the evidence. Indeed, as noted  
above, the survivors suffered serious burns and had



1 significant economic damages. In addition, part of their  
2 own recoverable non-economic damages related to the  
emotional trauma suffered by the parents and their son.

3 The parents had properly seat belted their children  
4 in the vehicle. Then, after this fire suddenly erupted  
5 in the vehicle they were able to exit, both of them on  
6 fire themselves. They then tried to rescue their two  
7 younger children who could not get out of their  
8 seatbelts. The parents were forced to watch while their  
9 children burned to death in front of their eyes. There  
were five seasoned lawyers working on behalf of the  
plaintiffs. I don't think that any of us had ever  
encountered a more compelling case for the recovery of  
non-economic damages. We felt a recovery of non-economic  
damages in excess of \$50 million was certainly possible  
if not probable.

10 \*\*\*

11 \*\*\*There was never any consideration for allocating  
12 any part of the settlement for punitive damages. Indeed,  
13 the settlement itself \*\*\* contemplated that all payments  
14 were on account of personal injury, and did not include  
15 punitive damages. Had Arch tried to allocate any amount  
16 as payment for punitive damages, which did not occur, we  
would have demanded a much greater settlement. As it was  
the settlement reached was a substantial compromise of  
the economic and non-economic damages that were not only  
claimed but that could have been recovered if it were a  
Plaintiff's verdict."

17 Declaration of J. Michael Alexander [dkt#135] pages 3-4.

18 As I was preparing this written opinion I had occasion to  
19 listen to the description of the fire by Mrs. Hibdon, a witness who  
20 immediately came upon the scene. Her account, given nearly 9 years  
21 after this fire was chilling. She described the horrible scene  
22 presented to the mother and father, on fire themselves, and forced  
23 to endure the holocaust-like scene of their youngest children dying  
24 a painful, unimaginable death, which is no doubt seared into their  
25 memories. This certainly supports Mr. Alexander's declaration  
26 about the damages recoverable and the substantial compromise made  
27 to settle those claims. However, even without this testimony of  
28 Mrs. Hibdon, no reasonable inference of a payment of punitive

1 damages in this settlement can be made from this record.

2 The case of Patton v. Target Corp., 349 Or. 230, 242 P.3d 611  
3 (2010) is relevant to this discussion as well. The case involved  
4 a wrongful discharge case that went to trial in our court. A  
5 verdict was returned for compensatory damages and punitive damages  
6 against the employer. Post verdict and prior to entry of any  
7 judgment the parties entered a settlement which called for a  
8 stipulated judgment dismissing the case. It was undisputed that  
9 the settlement did not include any payment for punitive damages.  
10 While defendant RSC here contends there must have been punitive  
11 damages in the Davidson settlement, there was no evidence to  
12 support that position on summary judgment and none offered now.  
13 It remains undisputed that no punitive damages were paid to the  
14 Davidsons. While the Patton case largely involved statutory  
15 construction issues, it clearly depends in part on the freedom of  
16 the parties to contract for the release of claims and payment of  
17 damages as they choose to characterize the payments. In Patton the  
18 State of Oregon lost its potential claim to 60% of the \$900,000.00  
19 in punitive damages awarded by a jury's verdict, but which  
20 evaporated with the settlement before it was reduced to judgment.  
21 The Supreme Court characterized the State as having at most an  
22 economic expectancy. If parties are free to contractually agree to  
23 settle in this situation and allocate nothing to punitive damages,  
24 surely they can do so before the injured party goes to trial or  
25 obtains a verdict for any damages, compensatory or punitive. The  
26 defendant who settles not only buys its peace with the plaintiff,  
27 but avoids the possibility that it may not be able to recover  
28 contribution for the punitive damages from other released

1 tortfeasors. The defendant in RSC's position must surely have less  
2 than an economic expectancy and more like an evanescent hope it  
3 could avoid contribution for punitive damages that were never  
4 addressed, much less assessed by a jury, and reduced to judgment.

5 For all these reasons, I adhere to my opinion and order  
6 [dkt#387] and extend it to dismiss the sixth affirmative defense.  
7 Only compensatory damages were paid under the settlement with the  
8 Davidsons. Compensatory damages are subject to a contribution  
9 claim in Oregon. There is no distinction between the compensatory  
10 damages recoverable for negligence, or any other level of  
11 culpability. Compensatory damages are measured not by the conduct  
12 of the defendant, but by the injuries of the plaintiff. While I  
13 can understand the argument that punitive damages are measured by  
14 the conduct of the defendant and liability for conduct subjectively  
15 intended to harm should not be able to be compared with simple  
16 negligence, even if the Supreme Court of Oregon were to adopt that  
17 view, it has no application here where there was no payment of any  
18 amount for punitive damages.

19  
20 IT IS SO ORDERED,

21  
22 Dated this 11th day of February, 2011.

23 /s/ Dennis J. Hubel

24 \_\_\_\_\_  
25 Dennis James Hubel  
26 United States Magistrate Judge  
27  
28